

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEREK S.,

Plaintiff,

v.

ACTING COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

CASE NO. 3:20-cv-6169-RAJ

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of defendant's denial of plaintiff's application for supplemental security income ("SSI").

This matter is fully briefed. *See* Dkts. 12-14.

1 The parties agree that plaintiff has at least occasional limitation with respect to
2 depth perception due to blindness in one eye. The parties also appear to agree that the
3 only potential job that plaintiff could have performed that is identified by the ALJ at the
4 final step in the administrative decision denying plaintiff's disability claim is the job of
5 janitor, because plaintiff cannot engage in occasional depth perception without "maybe"
6 being off task an impermissible amount of time. The parties appear to disagree only on
7 whether the job of janitor requires any depth perception ability. Unfortunately, because
8 the ALJ erred by failing to include any depth perception limitation in the hypothetical
9 presented to the vocational expert despite including it in plaintiff's residual functional
10 capacity, it is unclear from the written decision and the accompanying record the level of
11 depth perception requirements of the specifically identified job of janitor. Because the
12 ALJ carries defendant's burden at this final step in the disability determination process,
13 and because any implied finding that the job of janitor does not require any depth
14 perception is inconsistent with the actual testimony from the vocational expert in the
15 record, the Court concludes that the ALJ's finding that plaintiff could perform the job of
16 janitor is not supported by substantial evidence.

17
18 Because the Court also concludes that the ALJ's error is not harmless, this matter
19 must be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) for
20 further proceedings.
21

22 FACTUAL AND PROCEDURAL HISTORY

23 On August 21, 2018, plaintiff filed an application for SSI, alleging disability as of
24 January 1, 2015. *See* Dkt. 10, Administrative Record ("AR") 15. The application was

1 denied on initial administrative review and on reconsideration. *See* AR 15. A hearing was
 2 held before Administrative Law Judge Malcolm Ross (“the ALJ”) on May 5, 2020. *See*
 3 *id.* In a decision dated May 25, 2020, the ALJ determined plaintiff to be not disabled. *See*
 4 AR 12. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals
 5 Council, making the ALJ’s decision the final decision of the Commissioner. *See* AR 1-6;
 6 20 C.F.R. § 404.981, § 416.1481.

7 In plaintiff’s Opening Brief, plaintiff maintains the ALJ erred by failing to
 8 conclude that “plaintiff is disabled according to the ALJ’s own findings and the
 9 vocational expert’s testimony regarding the plaintiff’s blindness in his left eye.”
 10 Plaintiff’s Opening Brief (“Open”), Dkt. 12, pp. 1, 2-4. Defendant argues “any error was
 11 harmless and the ALJ’s decision should be affirmed.” Defendant’s Response Brief
 12 (“Response”), Dkt. 13, p. 1.

14 STANDARD OF REVIEW

15 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s
 16 denial of social security benefits if the ALJ’s findings are based on legal error or not
 17 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
 18 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
 19 1999)). “Substantial evidence” is more than a scintilla, less than a preponderance, and is
 20 such ““relevant evidence as a reasonable mind might accept as adequate to support a
 21 conclusion.”” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting Davis v.*
 22 *Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)).

24 DISCUSSION

I. Whether the ALJ erred by failing to conclude that plaintiff is disabled according to the ALJ's own findings and the vocational expert's testimony regarding the plaintiff's blindness in his left eye.

Plaintiff argues the ALJ erred by failing to conclude that "plaintiff is disabled according to the ALJ's own findings and the vocational expert's testimony regarding the plaintiff's blindness in his left eye." Open, pp. 1, 2-4. Defendant argues that "any error was harmless and the ALJ's decision should be affirmed." Response, p. 1.

Despite plaintiff's first argument that in the ALJ's determination of plaintiff's residual functional capacity ("RFC"), he "never mentions the Plaintiff's limitations regarding depth perception," a brief review of the ALJ's written decision negates that argument. Open, p. 2.

In this matter, after concluding at Step one of the sequential Social Security Disability analysis that plaintiff had not engaged in substantial gainful activity during the relevant period of time, the ALJ concluded at Step two that plaintiff had the following severe impairments: left eye blindness, major depression, and anxiety disorder." AR 17 (*citing* 20 C.F.R. 416.920(c)). After concluding that said severe impairments do not meet a Listing, *see id.* at 18 (*citing* 20 C.F.R. 416.920(d), 416.925 and 416.926), the ALJ determined plaintiff's RFC to include the following:

[Plaintiff] has the [RFC] to perform medium work as defined in 20 CFR 416.967(c) with the following limitations....[climbing limitations excluded] occasional exposure to hazards such as unprotected heights and dangerous machinery; jobs not requiring binocular vision; occasional use of depth perception; with work limited to simple, repetitive tasks; with no conveyor belt-paced production requirements; where standard work breaks are provided;[Social limitations excluded].

AR 19.

1 The Court notes here that the ALJ's written decision clearly limits plaintiff to
 2 "occasional use of depth perception" in the RFC. *See id.* As noted by plaintiff, "for Social
 3 Security purposes, [this limits plaintiff's use of depth perception] up to 1/3 of an 8-hour
 4 workday." Open, p. 2.

5 Finally, at the final and determinative Step five, (after finding at Step four that
 6 plaintiff could not perform past relevant work), at which point the burden shifts to the
 7 ALJ, the ALJ concluded that there were jobs that existed in significant numbers in the
 8 national economy that plaintiff could have performed, thereby allowing only a conclusion
 9 that plaintiff was not under a disability during the relevant period of time. *See* AR 22-23.
 10

11 If an ALJ reaches the final step in the sequential analysis, the burden shifts to the
 12 Commissioner on the fifth and final step of the sequential disability evaluation process.
 13 *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999); *see also Bowen v. Yuckert*, 482
 14 U.S. 137, 140, 146 n.5, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); *Johnson v. Shalala*, 60
 15 F.3d 1428, 1432 (9th Cir. 1995). The ALJ's Step 5 finding, like all findings under review
 16 by this Court, must be supported by substantial evidence in the overall record to be
 17 affirmed. *See Bayliss, supra*, 427 F.3d at 1214 n.1 (*citing Tidwell*, 161 F.3d at 601).
 18 Substantial evidence means more than a mere scintilla but less than a preponderance; it is
 19 such relevant evidence as a reasonable mind might accept as adequate to support a
 20 conclusion. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) (*citing Magallanes v.*
 21 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989)).
 22

23 Plaintiff argues that the ALJ has not met the Commissioner's burden at Step 5 to
 24 demonstrate that there are "substantial jobs existing in the economy the Plaintiff could

perform [and] has not only not shown that there are substantial numbers, the testimony of the Vocational Expert [“VE”] supports th[at] Plaintiff could not meet the productivity requirements for any of the named jobs given his limited depth perception.” Open, p. 3.

Defendant admits that in “the hypothetical question to the VE, the ALJ did not include the limitation to occasional use of depth perception.” Response, p. 2. This is legal error, as the RFC clearly includes such limitation, as noted above, *see supra* (citing RFC at AR 19).

It is arguably harmful legal error simply based on the ALJ’s failure to include a significant limitation from plaintiff’s RFC into the hypothetical presented to the VE, whose testimony regarding jobs a person with such hypothetical limitations can perform is relied on by the ALJ at the final Step five, when defendant carries the burden, to determine plaintiff was not disabled. Indeed, the Ninth Circuit clearly implied as such when remanding with a direction to award benefits in a case where relevant limitations were not included in the RFC or the hypothetical presented to the VE at Step five, *see infra*, Section II.

II. Harmless Error: Whether the ALJ’s error in failing to include all relevant limitations from plaintiff’s RFC into the hypothetical presented to the Vocational Expert (“VE”) upon which the ALJ relied at Step five when determining that plaintiff is not disabled is Harmless Error.

The Ninth Circuit has “long recognized that harmless error principles apply in the Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (citing *Stout v. v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006)). An

1 error is harmless if it is “inconsequential to the ultimate non[-]disability determination.”
2 *Molina*, 674 F.3d at 1117 (quoting *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d
3 1155, 1162 (9th Cir. 2008)).

4 The ALJ failed to include all of plaintiff’s impairments the ALJ found plaintiff to
5 experience during the relevant time in the RFC into the hypothetical posed to the VE. *See*
6 *supra*, Section I. The Ninth Circuit has stated that the RFC assessment and Step five
7 evaluation are not supported by substantial evidence when the RFC and hypotheticals to
8 the VE fail to account for all a claimant’s limitations. *See Lingenfelter v. Astrue*, 504 F.3d
9 1028, 1040–41 (9th Cir. 2007). After finding that a relevant limitation was improperly
10 not included in a claimant’s RFC, the Ninth Circuit concluded that “[n]or does substantial
11 evidence support the ALJ’s step-five determination, since it was based on this erroneous
12 RFC assessment.” *Id.* at 1041 (citations omitted). Here, we have a Step five
13 determination based on an erroneous hypothetical to the VE.
14

15 Defendant argues that here “any error was harmless and the ALJ’s decision should
16 be affirmed.” Response, p. 1. Specifically, in response to plaintiff’s argument that “the
17 testimony of the [VE] supports th[at] Plaintiff could not meet the productivity
18 requirements for any of the named jobs given his limited depth perception,” defendant
19 responds that “any error was harmless because the janitor job does not require depth
20 perception.” *Id.* at 2 (*citing* 1991 WL 672957); *see also* Open, p. 3. Defendant contends
21 that the “ALJ’s finding can be affirmed based on this job alone,” and does not attempt to
22 support the ALJ’s reliance on the other two jobs found by the ALJ to be jobs plaintiff
23 could have performed. Response, p. 2 (*citing* *Shaibi v. Berryhill*, 883 F.3d 1102, 1110 (9th
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1 Cir. 2018) (purportedly “affirming based on one job where there was an error as to the
2 other”)).

3 Regarding defendant’s argument, plaintiff replies as follows:

4 It is unclear where the defendant is getting this information, as this is not
5 what is found on the DOT’s website. Indeed, quite the opposite can be
6 found. The DOT references the Department of Labor’s O*NET for
7 updated findings with respect to janitorial positions identified. In the
8 ONET crosswalk for this job, there is an ‘Abilities’ list which details the
9 importance of different abilities needed for the job of janitor. Here, it is
clearly noted that Depth Perception has [a] score of 50 (presumably out of
100), which indicates that depth perception is at least important during
50% of the work of a janitor. This is inconsistent with the Defendant’s
argument.

10 Plaintiff’s Reply Brief, (“Reply”), Dkt. 14, pp. 2-3.

11 Under the title “Status of the Dictionary of Occupational Titles; use in Social
12 Security disability adjudications,” on the website of the Department of Labor, is indicated
13 the following:

14
15 The Dictionary of Occupational Titles (DOT) was created under the
16 sponsorship by the Employment and Training Administration (ETA) and was
last updated in 1991. The DOT was replaced by the O*Net, and ETA no
longer supports the DOT.

17 The O*Net is now the primary source of occupational information. It is
18 sponsored by ETA through a grant to the North Carolina Department of
Commerce. Thus, if you are looking for current occupational information
19 you should use the [O*Net](https://www.onetonline.org/).

20 <https://www.dol.gov/agencies/oalj/topics/libraries/LIBDOT> (last visited July 13, 2021)

21 (citing <https://www.onetonline.org/>).

22 On the ONET, (after translating the ALJ’s 1991 DOT 358.687-010 citation
23 number to the ONET classification system here:
24

1 <https://www.onetonline.org/crosswalk/DOT?s=358.687-010&g=Go> (last visited July 13,
2 2021) to 37-2011.00), when clicking on “janitors and cleaners, except maids and
3 housekeepers,” then clicking on “details,” and scrolling down to “abilities,” then
4 expanding abilities (by clicking on the “+”), one can see “depth perception,” is listed as a
5 “25” out of 100. See <https://www.onetonline.org/link/details/37-2011.00> (last visited
6 July 13, 2021). However, as cited by plaintiff, this job description according to the 67005
7 “crosswalk,” indicates a depth perception “importance” of 50 out of 100 for the job of
8 janitor. See Reply, p. 3 n 1 (*citing*
9 <https://occupationalinfo.org/onet/67005.html#ABILITIES> no) (last visited July 13, 2021).
10 Neither one of these “official” ONET numbers for “importance” of depth perception is
11 zero.
12

13 Defendant contends that the ALJ’s error in failing to include plaintiff’s limitations
14 with respect to depth perception into the hypothetical to the VE is harmless error because
15 the ALJ found that plaintiff could perform the job of janitor, which defendant contends
16 does not require any depth perception abilities. See Response, p. 2. However, defendant
17 has not established in argument or in the record that the job of janitor can be performed
18 by a person blind in one eye with limitation with respect to depth perception. The ALJ
19 failed to present a proper hypothetical to the VE, as the hypothetical to the VE at the
20 hearing contained no limitations regarding depth perception. See AR 44-45. Therefore,
21 the fact that the VE responded in testimony with the job of janitor in response to the
22 hypothetical is not substantial evidence demonstrating that plaintiff could do the job of
23 janitor, as the hypothetical was incomplete, failing to include all of plaintiff’s limitations.
24

1 See AR 19, 44-45; *Lingenfelter, supra*, 504 F.3d at 41. In fact, when the Court reviews
2 the testimony of the VE, the VE's testimony does not support defendant's argument that
3 the job of janitor requires no depth perception. See AR 48. When responding to questions
4 from plaintiff's attorney, and specifically responding to questions regarding how
5 someone with limited depth perception could complete the job of janitor and the other
6 jobs identified by the VE, the VE responded "I think some of those jobs -- maybe all 3 of
7 them -- required occasional depth perception." AR 48.

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9 As already delineated by the Court, *see supra*, the ONET has 2 different answers
10 for the "importance" of depth perception for janitor, neither one of which is zero. In
11 addition, the ALJ's RFC includes a limitation to occasional depth perception, and it is
12 unclear how this translates to "importance," as it is used in the ONET terminology.
13 However, the website from the Department of Labor includes 2 non-zero answers, much
14 more in alignment with the VE's assessment of "occasional" depth perception for the
15 requirement of the janitor job. It appears based on the record that the job of janitor
16 requires approximately occasional depth perception. See AR 48. Defendant's citation to
17 Westlaw cannot overcome the VE's testimony, especially as the official ONET
18 information contradicts Westlaw and aligns with the testimony of the VE, who is the
19 "Vocational Expert." *See id.*

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21 The Court cannot conclude based on the specific record before it that the ALJ's
22 finding that plaintiff was capable of performing jobs requiring occasional depth
23 perception is based on substantial evidence in the record as a whole. Although it is not
24 certain that the job identified by the ALJ as janitor requires occasional depth perception,

1 the most definitive evidence gathered by the ALJ indicates as such, that is, the testimony
 2 by the VE. *See* AR 48. In addition, the evidence suggesting otherwise from Westlaw
 3 supplied by defendant is contradicted by the ONET information, which this Court is
 4 directed to by the Department of Labor's website. Furthermore, the VE testified upon
 5 further questioning from plaintiff's attorney, that if an individual is limited to only
 6 occasional depth perception, that such would create an issue with that person's
 7 "production-rate or being off-task -- level of being off-task." AR 48. Therefore, the VE's
 8 testimony suggests that plaintiff could not maintain an acceptable production rate at a job
 9 requiring occasional depth perception, as was impliedly conceded by Defendant. *See id.*;
 10 *see also* Response, p. 3.

12 Defendant's best argument is that the ALJ committed at worst harmless error by
 13 failing to include relevant limitations into the hypothetical presented to the vocational
 14 expert because plaintiff was capable of performing the job of janitor, which requires no
 15 depth perception. Response, pp. 2-3. However, substantial evidence does not support any
 16 implied finding by the ALJ that the job of janitor requires no depth perception, as the VE
 17 testimony contradicts such a finding, as does the ONET information. AR 48;
 18 <https://www.onetonline.org/crosswalk/DOT?s=358.687-010&g=Go> (last visited July 13,
 19 2021); <https://www.onetonline.org/link/details/37-2011.00> (last visited July 13, 2021);
 20 <https://occupationalinfo.org/onet/67005.html#ABILITIES> no (last visited July 13, 2021);
 21 *see also Corona v. Astrue*, 2010 U.S. Dist. LEXIS 75525 at *31 (S.D. Cal. April 19,
 22 2010) (unpublished opinion) ("However, the ALJ did not ask the vocational expert about
 23 any possible conflict between his testimony and the evidence provided by the DOT. Had
 24

1 the ALJ asked about a conflict, or reviewed the DOT's description of a Janitor, he would
 2 have found that depth perception is required to perform the job of a Janitor. (DOT §
 3 382.664-010). Therefore, Plaintiff would not be able to perform this job"). In fact,
 4 defendant impliedly concedes that "when depth perception is required as part of the job,"
 5 plaintiff's productivity and or production could be affected." Response, p. 3 (emphasis in
 6 defendant's response brief).

7
 8 Based on the record as a whole, the Court concludes the ALJ's finding at Step 5,
 9 the step at which the ALJ carries the burden, that plaintiff could perform the identified
 10 jobs requiring occasional depth perception, or any implied finding that the janitor job
 11 does not require occasional depth perception, is not a finding based on substantial
 12 evidence in the record. *See Magallanes*, 881 F.2d at 750 (*quoting Davis*, 868 F.2d at 325-
 13 26). It is not a finding that is based on sufficient "relevant evidence as a reasonable mind
 14 might accept as adequate to support a conclusion." *Id.* Perhaps most importantly, it is
 15 directly contradicted by the VE testimony.

16 **III. Regarding plaintiff's request for remand with a direction to award** 17 **benefits**

18 Plaintiff requests remand with a direction to award benefits. Open, pp. 3-4.
 19 Defendant does not appear to have responded to this request. *See* Response, Dkt. 13.

20 Generally, when the Social Security Administration does not determine a
 21 claimant's application properly, "the proper course, except in rare circumstances, is to
 22 remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*,
 23 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put
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1 forth a “test for determining when [improperly rejected] evidence should be credited and
 2 an immediate award of benefits directed.” *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th
 3 Cir. 2000) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). In one
 4 formulation of this test, after concluding that an ALJ erred, as stated by the Ninth Circuit:

5 Second, we turn to the question whether further administrative
 6 proceedings would be useful. In evaluating this issue, we consider [if]
 7 the record as a whole is free from conflicts, ambiguities, or gaps, [if] all
 8 factual issues have been resolved, and [if] the claimant’s entitlement to
 9 benefits is clear under the applicable legal rules.

10 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103 (9th Cir. 2014) (citations
 11 omitted).

12 Here, further administrative proceedings would be exceedingly useful. *See id.*; *see*
 13 *also, supra*, Sections I and II. First, remand would allow the ALJ the opportunity to
 14 present a proper hypothetical to a vocational expert. Second, such would allow a
 15 vocational expert the opportunity to evaluate the effect of monocular vision, and the lack
 16 of depth perception, on the hypothetical individual’s ability to perform jobs such as
 17 janitor. It will allow for a VE to testify directly on the issue, instead of what “maybe” the
 18 case based on an improper hypothetical. *See* AR 48. It is entirely unclear from the record
 19 and from the available administrative materials the requirements of the job of janitor and
 20 whether one with plaintiff’s limitations could perform such job. Therefore, further
 21 administrative proceedings would be useful. *See Treichler, supra*, 775 F.3d at 1103.

22 CONCLUSION

23 Based on the foregoing reasons, the Court hereby concludes the ALJ’s conclusion
 24 plaintiff was not disabled is not supported by substantial evidence. Accordingly,

1 Defendant's decision to deny benefits is reversed and this matter is remanded for further
2 administrative proceedings in accordance with the findings contained herein.

3 Dated this 4th day of August, 2021.

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6 The Honorable Richard A. Jones
7 United States District Judge
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